SUPREME COURT, U. S.

JUL 24 1968

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IN THE

Supreme Court of the United States

October Term, 1968

No. 225

MONTELL R. MEACHAM, dba the "Barbary Coast;"

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

Respondent adopts the statement describing the decisions of the California courts as set forth in the Petition for Writ of Certiorari.

Jurisdiction.

The decision of the Court of Appeal of the Second Appellate District of California denying the Petition for Writ of Review was entered on March 28, 1968. The decision of the California Supreme Court denying a petition for hearing was entered on May 15, 1968. No

rehearing was sought in the court below and no extension sought within which to petition for certiorari. Petitioner believes that jurisdiction to review the judgment in question is conferred by 28 U.S.C. § 1257(3) and Rule 19(1)(a) of the Rules of the United States Supreme Court.

Statement of Questions Presented.

1. Does the following conduct, upon which suspension of petitioner's alcoholic beverage license was based, come within the scope of the First Amendment provisions respecting free speech: Petitioner operated a beer bar in which the women who tended bar and waited on patrons wore costumes which fully exposed their breasts to public view (colloquially known as "topless waitresses"). If such conduct is in the nature of speech protected by the First Amendment, does the California Department of Alcoholic Beverage Control have authority to determine that such conduct should not occur in a place where alcoholic beverages are sold and consumed?

2. Was it a violation of the due process clause of the Fourteenth Amendment for the Department of Alcoholic Beverage Control to suspend petitioner's license to sell alcoholic beverages on the ground that petitioner had engaged in conduct which was "contrary to public welfare or morals", as that phrase is used in Article XX, Section 22 of the Constitution of the State of California and as that phrase has been applied by the courts of the State of California?

3. Under California law does the Department of Alcoholic Beverage Control have authority to determine that conduct which does not violate any statute or rule of the Department is nevertheless contrary to public welfare or morals?

4. Was it a denial of due process for the Court of Appeal of the State of California to deny a Petition for Writ of Review without first requesting that a response be filed, without first inspecting the administrative record and without first providing the parties an opportunity to make oral argument?

Statement of the Case.

Respondent accepts the statement of the case contained in the Petition for Writ of Certiorari.

ARGUMENT.

I.

The Decision Suspending Petitioner's License Is Not in Violation of the Free Speech Clause of the First Amendment.

Under Roman numeral I petitioner argues that a writ of certiorari should be granted because "entertainment and dancing are forms of expression protected under the First Amendment." Whether or not the proposition stated in the petition is entirely correct, the argument is irrelevant because there is nothing in the record which indicates that the topless waitresses employed by petitioner were engaged in any form of entertainment or dancing. The unchallenged findings of the Department are that petitioner employed and used the services of females who tended bar and waited on patrons while attired in bikini pants with their breasts fully exposed to public view. These employees acted only in the capacity of waitresses, being set apart from ordinary waitresses only by the manner in which they were attired. The waitresses did not dance; they did not sing; they did not engage in any dramatic performance; and, petitioner has not cited to any part of the record which indicates that the waitresses were otherwise engaged in any form of entertainment. There is nothing in the record to indicate that petitioner was of the belief that he was communicating any ideas by employing topless waitresses or to indicate that the topless waitresses employed by petitioner believed they were engaged in the communication of any ideas.

> ". . . . No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct." *Roth v. United States,* 354 U.S. 476, 512 (1957). (Dissent by Mr. Justice Douglas.)

Even if the topless waitresses employed by petitioner were engaged in some form of expression, the State would still have authority to regulate or prohibit such expression in connection with its authority to regulate the sale and consumption of alcoholic beverages. *Cf. Konigsberg v. State Bar,* 366 U.S. 36, 50 (1961); *Prince v. Massachusetts,* 321 U.S. 158 (1944).

II.

The Provisions of Article XX, Section 22 of the California Constitution Authorizing the Department to Suspend Any Specific Alcoholic Beverage License if It Determines That Continuance of the License Would Be "Contrary to Public Welfare or Morals" Is a Delegation of Administrative Authority Which Is Sufficiently Specific to Satisfy the Requirements of Due Process.

In making his argument that Article XX, Section 22 of the California Constitution is void for vagueness petitioner relies in large part upon cases arising from criminal prosecutions, such as *United States v. Harriss,* 347 U.S. 612 (1954) and *Connally v. General Const. Co.,* 269 U.S. 385 (1926) or upon civil cases in which the standard of conduct sought to be applied was based upon the text of a criminal statute, such as *Small Co. v. Am. Sugar Ref. Co., 267* U.S. 233 (1925). However, the instant case does not involve a criminal proceeding nor does it involve the application of a legislative standard of conduct which would ever be applicable to a criminal proceeding. Thus, Article XX, Section 22 of the California Constitution is only required to have that degree of specificity required of statutes which delegate administrative authority.

It is established that statutes which merely delegate administrative authority need not have the degree of specificity required of statutes which define criminal offenses, since one of the principal purposes of the former type of statute is to create an area in which the administrative agency may exercise the discretion delegated to it by the Legislature. *American Power Co. v. S. E. C.*, 329 U.S. 90, 105 (1946) (in which the court upheld the commission's statutory authority to approve reorganization plans which would be "fair and equitable to the persons affected" but would not be "detrimental to the public interest or interests of investors" or would not lead to an "unfair or inequitable distribution of voting power".)

Moreover, as petitioner expressly recognizes, the meaning of the phrase "contrary to public welfare or morals" contained in the California Constitution must be determined in light of the State cases which have defined and interpreted it. *Musser v. Utah,* 333 U.S. 95, 97-98 (1948); *Cox v. New Hampshire,* 312 U.S. 569, 575-76 (1941). The constitutional phrase has been applied and interpreted in numerous appellate decisions, many of which are discussed by petitioner. In some of the cases discussed by petitioner the decision of the Department was upheld upon the ground that the conduct involved was contrary to public welfare or morals; in other cases discussed by petitioner the decision of the Department was reversed upon the ground that the conduct involved was not contrary to public welfare or morals. In none of the cases was the question of vagueness raised, from which it can be inferred that the phrase is well enough understood to be constitutionally certain and to permit the courts to apply the stand-

ards to specific cases as they arise. *Jordan v. De George,* 341 U.S. 223, 230 (1951).

The most pertinent of the cases in which the California courts have applied the phrase "contrary to public welfare or morals" is *Adler v. Dept. Alcoholic Bev. Control,* 174 Cal. App. 2d 256 (1959). In *Adler* the license was revoked on a finding that the licensee had violated section 25601 of the California Business and Professions Code. Section 25601 prohibited the use of any licensed premises as a ". . . disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety . . ." Cal. Bus. & Prof. Code § 25601. In affirming the decision of the Department the court summarized the evidence as follows:

> ". . . [O]ne taxi dancer rubbed her hands against the leg of a witness and then 'touching him in the pubic area' asked him to go home with her saying 'you can have ham and eggs or anything else you would like.' Another girl demonstrated her 'peek-a-boo' dress by exposing her breasts to a customer who happened to be an agent of respondent board. On another occasion the same taxi dancer illustrated the punch line of a story she was telling by pulling the upper part of her dress away from her body displaying her bosom. There was also evidence that sexually suggestive dancing occurred as charged. The evidence is substantial in character and supports the finding of the board that the licensed premises were permittted to be used for purposes injurious to public morals."
>
> *Adler v. Dept. Alcoholic Bev. Control, supra,* 174 Cal. App. 2d 256, 258 (1959).

A fortiori, if evidence that taxi dancers temporarily displayed their breasts on two occasions supports a decision that the premises were used for purposes injurious to public morals, the findings in the instant case that female barmaids wore costumes which completely exposed their breasts at all times supports the Department's conclusion that the premises were used in a manner contrary to public welfare or morals.

III.

The California Department of Alcoholic Beverage Control Has Authority to Determine That the Employment of Topless Waitresses in a Licensed Beer Bar Is Contrary to Public Welfare or Morals, Even Though Such Conduct Is Not Expressly Prohibited by Any Statute of the State of California or by Any Rule or Regulation of the Department.

Under Roman numerals III and IV of the Petition it is argued that the Department of Alcoholic Beverage Control could not prohibit the employment of topless waitresses without enacting a specific rule or regulation covering such conduct. However, the question raised is essentially one of State rather than Federal law. The question of whether the California Department of Alcoholic Beverage Control has acted within the scope of authority delegated to it by the People of the State of California is essentially one of State law and is not a question involving the United States Constitution. Indeed, nowhere in its argument under Roman numerals III and IV does petitioner point out any provision of the United States Constitution which might be pertinent to the instant case.

In any event, it is well settled under California law that the Department may suspend or revoke an alcoholic beverage license for conduct which is not otherwise prohibited by law or by rule of the Department. *Vallerga v. Dept. Alcoholic Bev. Control,* 53 Cal. 2d 313, 318-19 (1960); *Cornell v. Reilly,* 127 Cal. App. 2d 178, 185-86 (1954); *Moore v. State Board of Equalization,* 76 Cal. App. 2d 758 (1946). Of course, the decision of the California courts in the instant case also establishes that the Department was acting within the scope of authority granted to it by the State.

By way of analogy it is also established that a federal administrative agency may, in enforcing a general delegation of authority, prohibit or regulate conduct which is not otherwise prohibited by statute or by rule of the agency. *Securities Comm'n v. Chenery Corp.,* 332 U.S. 194, 202-03 (1947).

IV.

Petitioner Was Not Deprived of Judicial Review by the Proceedings Below.

Under Section 23090 of the California Business and Professions Code judicial review of a decision of the Department of Alcoholic Beverage Control is obtained by filing a Petition for Writ of Review in the Court of Appeal of the State of California. In the instant case petitioner filed such a petition and the petition was denied. The Court of Appeal did not ask the Department to file any written opposition to the petition nor did it ask the Department to file the administrative record with the court. Oral argument was not held prior to the denial of the petition. The Petition for Hearing in the California Supreme Court which followed was denied in the same manner.

Under Roman numeral V petitioner argues that the procedures followed in the State courts did not constitute a sufficient form of judicial review to meet the requirements of due process. This issue is being raised for the first time in the Petition for Writ of Certiorari; it was not raised by petitioner in his Petition for Writ of Review filed with the Court of Appeal of the State of California; nor was it raised in his Petition for Hearing filed subsequently with the Supreme Court of the State of California. In any event, it has been held that the procedure which was followed in the California courts is sufficient to constitute the judicial review required by due process and that the decision denying the Petition for Writ of Review is a decision on the merits affirming the decision of the Department of Alcoholic Beverage Control. See *Napa Valley Co. v. R. R. Comm.*, 251 U.S. 366, 371-73 (1920); *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954).

Conclusion.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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